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No. 91-487

In The

Supreme Court of the United States

October Term, 1991

BRUCE PHILIP LARSON,

Petitioner,

vs.

STATE OF MINNESOTA,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Minnesota

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Does the Confrontation Clause allow admission of the out-of-court statements of an available but non-testifying child victim who was produced by the State at trial, unexpectedly found competent, and thus equally available to the defense had it chosen to call her for cross-examination?

2. Is the Confrontation Clause's requirement for an opportunity to cross-examine met where a witness is available to be called by the defense, but the defense chooses not to do so?

3. Does Minnesota's prospective state rule, requiring the prosecution to call an available child witness whose hearsay statements are being admitted if expressly requested to do so by the defense, comport with the Constitution?

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Minnesota Supreme Court's opinion in this case.

THE OPINION BELOW

Petitioner seeks a writ of certiorari to review the judgment and opinion of the Supreme Court of Minnesota in *State v. Larson*, 472 N.W.2d 120 (Minn. 1991).

STATEMENT OF THE CASE

This is a child sexual abuse case that began on May 1, 1987, when B., a girl then almost four years old, reported sexual contact by her father to a physician's assistant during a medical examination at a family practice clinic. B. had previously complained of vaginal soreness and burning urination and was taken to the clinic for an exam by her mother (T. 172).[1]

The physician's assistant conducting the exam observed redness and swelling around the vaginal opening (T. 173). The examiner, suspecting abuse, asked B. who had touched her. In response, B. said that "Daddy" had touched her with "his bone" that "came out of his pants." B. told the examiner that it had hurt and she had asked him to stop.

Subsequent investigation, which included other out-of-court statements by B. to medical personnel, investigators and her mother, led to a complaint being filed on December 15, 1987, charging petitioner with criminal sexual conduct against B.

Because of the prosecutor's good faith belief that B. was incompetent to testify, the State's professed intention from the beginning of the prosecution was to rely solely on the out-of-court statements of B. rather than calling her personally as a witness at trial (*e.g.* 1st O.H. 3; 2d O.H. 4; T. 13-14, 154).[2] B. was only three or four years old

[1] "T." refers to the trial transcript.

[2] "1st O.H." refers to the transcript of the first omnibus hearing held on June 15, 1988.

(Continued on following page)

at the time of the abuse, and had only recently turned five years old by the trial. Therefore, the prosecutor had serious concerns about her ability to remember and relate facts concerning the incident (1st O.H. 3; T. 33). These concerns were bolstered by the opinion of a psychotherapist (1st O.H. 3).

Prior to trial, at the June 15, 1988 omnibus hearing, petitioner moved to suppress the out-of-court statements made by B., on the ground that his right to confrontation would be denied. The parties assumed for purposes of the hearing that B. was incompetent. The trial court ruled that the out-of-court statements were reliable, corroborated, and admissible under Minn. Stat. § 595.02, subd. 3 (1988).[3]

At the August 18, 1988 reconvened omnibus hearing, petitioner renewed his motion to suppress B.'s out-of-court statements on constitutional grounds, based on this Court's then recent decision in *Coy v. Iowa*, 487 U.S. 1012 (1988). The trial court again denied petitioner's motion to suppress B.'s out-of-court statements, finding that *Coy* did not apply.

This remained the state of the evidentiary questions until August 30, 1988, the first day of trial. On that day petitioner informed the trial court that he intended to call B. as a witness (T. 14-16). Therefore, the trial court

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"2d O.H." refers to the transcript of the reconvened omnibus hearing held on August 19, 1988.

[3] The text of Minn. Stat. § 595.02 subd. 3 (1988) is set forth in the petition at pages 5-7.

arranged a competency hearing in chambers before the trial would commence (T. 15). The trial court explained that "it is understood that neither party – if the Court finds [B.] is competent . . . has to call her if they don't wish to do so" (T. 16).

B. was produced by the State for the competency hearing (T. 25). Despite the concerns of the State as to her ability as a witness (T. 15, 33, 38); B. was declared competent by the trial court (T. 45). However, in making its competency ruling, the trial court recognized that B.'s ability to remember was very limited (T. 44-45).

In any event, neither the State nor petitioner called B. as a witness during the course of the four day trial. The State did not call her in accord with its professed concern whether B. had the ability to present any relevant evidence (T. 154). Instead, the State introduced B.'s out-of-court statements. The defense failed to call B. for reasons not apparent in the record. However, petitioner did call twelve other witnesses, including defendant himself (T. 459).

The jury found petitioner guilty of criminal sexual conduct in the second degree (T. 664). On direct appeal the Minnesota Court of Appeals remanded the case, concluding that admission of B.'s out-of-court statements was prejudicial error if she had been properly ruled competent, but that the competency ruling therefore had to be reexamined in that light. *State v. Larson*, 447 N.W.2d 593, 598-599 (Minn. Ct. App. 1989).

However, on further review by the Minnesota Supreme Court, the Court of Appeals was reversed and petitioner's conviction was affirmed. *State v. Larson*, 453

N.W.2d 42 (Minn. 1990) *reh'g. denied* (Minn. May 15, 1990) (*"Larson I"*).

A petition for a writ of certiorari was subsequently filed by petitioner with this Court. On October 1, 1990 an order was entered granting the petition for the purpose of remanding the case back to the Minnesota Supreme Court for further consideration in light of this Court's then recent decision in *Idaho v. Wright*, 497 U.S. ___, 110 S.Ct. 3139 (1990). *Larson v. Minnesota*, ___ U.S. ___, 111 S.Ct. 29 (1990).

On remand, the Minnesota Supreme Court asked for further briefs and heard additional oral argument. On July 12, 1991 it filed its decision holding that: "After careful reconsideration of the case in light of *Wright*, we reaffirm the judgment of conviction." *State v. Larson*, 472 N.W.2d 120, 122 (Minn. 1991); Appendix I at 3.[4] (*"Larson II"*).

Unfortunately, in petitioner Larson's statement of the case herein, his description of the Minnesota Supreme Court's opinion is inaccurate in two respects. First, petitioner erroneously states that the Minnesota Supreme Court, in its footnote dealing with the question of unavailability, "noted the confusion among commentators as to the unavailability requirement and the significance of the decision in *Idaho v. Wright, supra*, on this point." Petition at 14. In fact, the Minnesota Supreme Court noted no such confusion. Rather it professed only harmony between its holding and the views of leading

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[4] "Appendix" refers to the petitioner's appendix attached to the petition for a writ of certiorari herein.

commentators on the subject, while pointing out that it was the lone dissenting justice's view which was "at odds with that advanced by leading commentators. *Larson II*, 472 N.W.2d at 124, n.1; Appendix I at 13-14. The only possible reference to which petitioner may be alluding would be the Minnesota Supreme Court's mention that the editors of a Harvard Law Review Note thought it "unclear" from the Confrontation Clause cases "whether a showing of unavailability is required." *Larson II*, 472 N.W.2d at 124, n.1; Appendix I at 14-15. However, this is a far cry from implying "confusion" among the leading commentators.

Second, petitioner inaccurately describes the Minnesota Supreme Court as "acknowledging constitutional concerns" in adopting its prospective evidentiary rule requiring the State to call witnesses if requested by the defense. Petition at 15. Nothing in either *Larson I* or *Larson II* indicates that the Minnesota Supreme Court's rule had such a constitutional basis. In fact, the Minnesota Supreme Court expressly noted that the prospective rule was "a matter of state evidentiary law." *Larson II*, 472 N.W.2d at 124, n.1; Appendix I at 15.

REASONS FOR DENYING THE WRIT

I. INTRODUCTION AND SUMMARY OF THE ARGUMENT

A writ in this case is neither necessary nor warranted because there exist no "special and important reasons" for the exercise of this Court's discretionary power of review. U.S. Sup. Ct. Rule 10.1.

This is a factually specific case in which the basic parameters already established by this Court relating to "unavailability" were adhered to. The Supreme Court of Minnesota correctly held that petitioner's right of confrontation was not violated by admitting a nontestifying child's extrajudicial statements where those statements had independent evidentiary significance, and where petitioner himself was free to call and cross-examine the child, but declined to do so. *Larson II*, 472 N.W.2d at 124, n.1; Appendix I at 12.

In reaching its decision, the Minnesota Supreme Court made no broad based or new assertions of constitutional law, but instead carefully limited the unavailability analysis used by this Court in *United States v. Inadi*, 475 U.S. 387 (1986) to "the circumstances of this case." *Larson I*, 453 N.W.2d at 46; and *Larson II*, 472 N.W.2d at 124, n.1; Appendix I at 12.

Accordingly, this case is readily distinguishable from *White v. Illinois*, 198 Ill. App. 3d 641, 555 N.E.2d 1241 (1990), *leave to appeal denied*, 133 Ill.2d 570, 561 N.E.2d 705, *cert. granted* ___ U.S. ___, 111 S.Ct. 1681 (1991). In *White*, the Illinois court announced a much broader holding than that of Minnesota's court herein. It held that, except in cases of previous sworn testimony, the unavailability of a declarant is "irrelevant to the determination of whether an out-of-court statement of that declarant is admissible." 555 N.E.2d at 1252. Further, unlike the present case, in *White* there is no indication whatsoever that the child victim was even produced by the prosecution, much less

available to be called by the defense for cross-examination. Indeed, the defense in *White* argued that "the prosecution neither produced the declarant . . . nor established that she was unavailable." 555 N.E.2d at 1251.

Because of these considerations, the petition herein clearly should be denied.

II. THIS CASE RAISES NO SPECIAL AND IMPORTANT ISSUE BECAUSE THE MINNESOTA SUPREME COURT CORRECTLY APPLIED ESTABLISHED CONFRONTATION CLAUSE PRINCIPLES RELATING TO UNAVAILABILITY TO THE PARTICULAR FACTS OF THIS CASE.

The basis principles relating to when the Confrontation Clause requires the "unavailability" of an out-of-court declarant are already well established, and were correctly applied by the Minnesota Supreme Court to the narrow facts of this case. Nothing in *Idaho v. Wright*, 497 U.S. ___, 110 S.Ct. 3139 (1990) changed those principles. While the broad assertions of the state court in *White v. Illinois* may have given cause to grant certiorari in that case, the decision of the Minnesota Supreme Court herein suffers from no such defect.

In *Ohio v. Roberts*, 445 U.S. 56 (1980) this Court generally established "a rule of necessity" for the admission of out-of-court statements which does not always require a showing of unavailability:

> First, in conformance with the Framers' preference for face-to-face accusations, the Sixth Amendment establishes *a rule of necessity*. In the usual case (including cases where prior cross-

> examination has occurred), the prosecution must *either produce*, or *demonstrate the unavailability of*, the declarant whose statement it wishes to use against the defendant.

Id. at 65 (emphasis added).

Thus, as in the case at hand, the prosecution may meet the necessity requirement by *either* producing the witness *or* demonstrating her unavailability. *Roberts* itself specifically noted that a "demonstration of unavailability . . . is not always required."; especially in cases where the utility of trial confrontation would be minimal. *Roberts* at 65, n. 7. In this case B. was produced at trial and equally available to both sides. The fact that she was not called as a witness by the defense is an implicit admission that the utility of confronting her at trial was too remote to invoke constitutional concern over her "availability."

Further, the Minnesota Supreme Court recognized that the out-of-court statements herein "had independent evidentiary significance." *Larson II*, 472 N.W.2d at 124, n.1, Appendix I at 12. As in the case of the co-conspirator statements in *Inadi*, this significance arose from the context in which the statements were made by the child, which could not be duplicated at trial even if the declarant was called to the stand. Accordingly, as in *Inadi*, little would be gained in this case by application of a rigid unavailability rule, especially where the witness is "produced" by the prosecution.

In *Inadi* this Court recognized that the "unavailability" language of *Ohio v. Roberts*, 448 U.S. 56, 65 (1980) was not intended "as an abstract answer to questions not

presented in that case, but rather as a resolution of the issue the Court said it was examining . . . " *Inadi* at 392-393. *See also, Bourjaily v. United States*, 483 U.S. 171 (1987) [The two pronged unavailability and reliability approach of *Roberts* was set forth "as a general matter only"]. Thus, far from being in conflict, the basic principles established in both *Roberts* and *Inadi* are in agreement regarding the need for unavailability under the Confrontation Clause.

This agreement was expressly recognized in *Idaho v. Wright*, when this Court said:

> We have applied the general approach articulated in *Roberts* to subsequent cases raising Confrontation Clause and hearsay issues. In *United States v. Inadi, supra*, we held that the general requirement of unavailability did not apply to incriminating out-of-court statements made by a nontestifying co-conspirator and that therefore the Confrontation Clause did not prohibit the admission of such statements, even though the government had not shown that the declarant was unavailable to testify at trial. 475 U.S. at 394-400.

Id. at ___, 110 S.Ct. at 3146.

Inadi did nothing more than recognize that there were going to be cases where a declarant of otherwise admissible hearsay would technically be "available," but would not be called to the witness stand by either side for a variety of reasons. *Inadi* at 396-398. This Court wisely reasoned that application of a mechanical unavailability rule in such circumstances is not required by the Confrontation Clause, holding that:

> Any marginal protection to the defendant by forcing the government to call as witnesses those co-conspirator declarants who are available, willing to testify, hostile to the defense, and yet not already subpoenaed by the prosecution, when the defendant himself can call and cross-examine such declarants, cannot support an unavailability rule.

Inadi at 399-400.

In the case at hand, the Minnesota Supreme Court followed the same reasoning as *Inadi*. Here, B. was actually "produced" by the State and available for cross-examination. *Roberts'* requirement for production of a witness by the prosecution has never been interpreted to require that the witness actually be called to the stand, so long as the witness is available to the defense for cross-examination if it so chooses. After all, it is the opportunity for cross-examination which the Confrontation Clause requires, not that cross-examination actually occur. *See Roberts* at 70; and *Lee v. Illinois*, 476 U.S. 530, 549 n.3 (1986) [Blackmun, J., joined by three other Justices, dissenting on other grounds]. *See also Tennessee v. Street*, 471 U.S. 409, 416 (1985) ["It was appropriate that, instead of forcing the State to call a witness who could offer no relevant testimony on the immediate issue . . . , the trial judge left to respondent the choice whether to call (the declarant)"].[5]

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[5] At least two of the federal circuits have, since *Roberts*, found that the government's burden is met by simply obtaining an available hearsay declarant's presence at trial or making the declarant available to the defense, without the need for

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None of this denied petitioner his right of confrontation. B. had been declared competent (albeit unexpectedly so) by the trial court. Therefore, petitioner was free to call her to the stand himself to confront her about the extra-judicial statements she had made against him. But, as the Minnesota Supreme Court correctly noted, petitioner did not do so because it was "not at all clear that it was in the interests of the defendant that the declarant be called by either side." *Larson*, 453 N.W.2d at 45-46. Clearly, the Minnesota Supreme Court correctly found that petitioner had been afforded his right of confrontation, but simply chose not to exercise it.

Because there is no unsettled question of unavailability raised in this case which is worthy of further review, the petition should be denied.

III. THE FACTUAL SITUATION PRESENTED BY THIS CASE IS NARROW AND UNLIKELY TO RECUR ON ANY TYPE OF REGULAR BASIS.

The instant case does not pose an important federal question because of its very narrow and unusual set of facts. The usual situation in cases of child sexual abuse finds the prosecution offering the testimony of the victim as the main pillar of its case. *See, e.g. Maryland v. Craig*, ___ U.S. ___, 110 S.Ct. 3157 (1990); and *Coy v. Iowa*, 487

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actually calling the witness to testify. *United States v. Massa*, 740 F.2d 629, 640 n.6 (8th Cir. 1984) *cert. denied* 471 U.S. 1115; and *Reardon v. Manson*, 806 F.2d 39, 42-43 (2d Cir. 1986) *cert. denied* 481 U.S. 1020.

U.S. 1012 (1988). Likewise, it is usually the defense which attempts to prevent such evidence by arguing that the witness is incompetent.

Here, however, the roles were reversed in a situation that is not likely to recur very often. The prosecution, supported by an expert's opinion, realized from the very beginning that B. was the type of very young girl who would not be able to remember or relate at trial the abuse which she had earlier reported happened to her over a year before the trial (1st O.H. 3). Indeed, prior to trial, the defense and the trial court as well assumed her incompetent to testify and thus unavailable. Consequently, there was no thought prior to trail of holding a competency hearing.

But petitioner, on the first day of trial, announced his intention to possibly call B. as a witness (an intention that was not, in the event, fulfilled), thereby causing the trial court to hold a competency hearing. At the end of that hearing B. was unexpectedly found competent, although in finding her so the trial court recognized the strong possibility that B. may not be able to remember anything (T. 45); and expressly told counsel that neither party had to call her (T. 16).

Given these circumstances it is hardly surprising that the prosecution continued with its planned strategy of not calling B. and instead relying upon other evidence, including B.'s otherwise admissible hearsay statements, to prove its case. What is surprising, however, is the fact that petitioner did not call B. himself, even though she

had been "produced" by the State and was made available for cross-examination by the trial court's competency ruling.

Why petitioner did not call B. is not apparent from the record. What is apparent, however, is that petitioner's failure to call a witness whom the State had produced, and who had been found competent (albeit barely so) at petitioner's own request, is a very narrow, if not unique, set of facts. Because it is highly unlikely to recur on any sort of regular basis, the question is not an important one for this Court to review.

As for petitioner's claim that Minnesota's decision will somehow open the floodgates to trials being held without any victim testimony, this poses no real danger to our present system of justice. In this country the availability of circumstantial as well as direct evidence has meant that all manner of criminal trials can be conducted without the direct testimony of the victims themselves. Homicide cases are the most obvious example. In each instance the question is whether the evidence actually relied upon by the prosecutor is constitutionally admissible; not whether the prosecutor could have presented something better. In any event, given the heavy burden of proof placed upon prosecutors, it can be reliably said that the vast majority of prosecutors who have direct victim testimony available will continue to make every attempt to use it at trial.

IV. THE MINNESOTA SUPREME COURT'S PROSPECTIVE RULE, REQUIRING THE STATE TO CALL AN AVAILABLE WITNESS WHOSE HEARSAY STATEMENTS ARE BEING ADMITTED WHEN REQUESTED BY THE DEFENSE TO DO SO, IS A STATE RULE WHICH ADDS TO DEFENDANTS' RIGHTS AND DOES NOT DIMINISH ANY CONSTITUTIONAL RIGHT.

Petitioner additionally claims that the prospective state rule adopted by the Minnesota Supreme Court is a question for this Court to review. However, that rule effectively grants defendants more rights as a matter of state evidentiary law, not less. Clearly, this is not a federal question, much less an important one.

Minnesota's rule, which requires the State to call available child hearsay declarants when expressly requested by the defense to do so, *Larson I*, 453 N.W.2d at 47, is "a matter of state evidentiary law" based upon the Minnesota Supreme Court's own supervisory power. *Larson II*, 472 N.W.2d at 124, n.1; Appendix I at 15.

In fashioning its rule the Minnesota Supreme Court cited no federal authority. It simply said, by way of justification, that:

> We recognize, however, that a defendant who wants to cross-examine an available child witness whose extrajudicial statements are being used by the state should not be compelled to call the child as a witness if the defendant would prefer that the state call the witness.

Larson I at 47. This is the sort of reasoning used by state appellate courts in exercising their supervisory authority.

It is certainly not based upon any federal constitutional imperative.

Nor does the rule violate any federal constitutional provision. The Confrontation Clause does not absolve defendants from procuring witnesses they feel are important to their defense. As explained in Part I, *supra*, it has become clearly established that the right to confrontation is satisfied if a defendant has the opportunity to call the declarant of hearsay as a witness for cross-examination. *Inadi*, 475 U.S. at 397-399; *Tennessee v. Street*, 471 U.S. at 416; *Lee v. Illinois*, 476 U.S. at 549 n.3 (Blackmun, J., dissenting on other grounds); *Reardon v. Manson*, 806 F.2d at 42; and *United States v. Massa*, 740 F.2d at 640 n.6. Minnesota's rule simply adds the additional option of allowing the defense to force the State to call such witnesses itself.

Likewise, there is no merit to petitioner's contention that Minnesota's prospective rule somehow shifts the burden of proof to defendants. The State must still prove its case beyond a reasonable doubt, and if it cannot do so on its case-in-chief then there will be a dismissal and the defense need do nothing. If anything, the new rule adds to the State's burden rather than defendant's, by requiring it to call hearsay declarant witnesses even in those rare cases where the State feels that it can prove its case-in-chief without them.

Because Minnesota's prospective rule is a local one that adds to defendants' rights rather than diminishes them, it is not an important federal question.

V. BECAUSE THE MINNESOTA SUPREME COURT'S RESOLUTION OF THIS CASE WAS BASED UPON SETTLED PRINCIPLES THAT ARE UNLIKELY TO BE CHANGED BY *WHITE V. ILLINOIS*, A STAY OF ACTION IS UNNECESSARY.

There is no need for a stay of action on this petition pending this Court's decision in *White v. Illinois*, because this case is readily distinguishable both legally and factually from the broader issue raised in *White*.

As explained in Part II, *supra*, the Minnesota Supreme Court herein did nothing more than apply the settled "unavailability" analysis established by *Inadi* and *Roberts* to the particular facts of this case. In *White*, on the other hand, the Illinois court raised a much broader issue by categorically holding that except in cases of previous sworn testimony, the unavailability of a declarant is always "irrelevant to the determination of whether an out-of-court statement of that declarant is admissible" *White*, 555 N.E.2d at 1252. Even if this broad proposition is rejected as not being in accord with *Inadi* and *Roberts*, such a result begs the question of whether the Minnesota Supreme Court's narrow application of *Inadi* and *Roberts* to the case at hand was proper.

Furthermore, this case is factually different from *White*, where there was no evidence that the child victim was ever "produced" by the prosecution, or otherwise made available to the defense to call for cross-examination. This important factual distinction provides a further basis for not granting the petition herein now, rather than staying action pending the outcome in *White*.

CONCLUSION

For all the above reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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